

1 **UNITED STATES DISTRICT COURT**
2 **DISTRICT OF NEVADA**

3
4 X-Trementeprise, et al.,

Case No.: 2:18-cv-00650-JAD-PAL

5 Plaintiffs/counter-defendants

6 v.

**Order Denying Motion to
Dismiss Without Prejudice**

7 Shenzhen ImagineVision Technology Ltd., et
8 al.,

[ECF No. 14]

9 Defendants/counter-plaintiffs

10 This suit began as primarily a trademark-infringement action between plaintiff
11 X-Trementeprise (X-Treme), a French corporation, and defendant Shenzhen ImagineVision, a
12 Chinese company, over a brand of digital cameras.¹ After ImagineVision counterclaimed,
13 X-Treme filed an amended complaint that added XSories, another foreign corporation, as a
14 plaintiff, several foreign entities and individuals as defendants, and eight new claims sounding in
15 contract and tort.² This now-expanded action centers on a joint-venture agreement to develop,
16 manufacture, and sell miniature sports cameras worldwide, including the brand at issue in the
17 trademark dispute. This agreement resulted in the creation of ImagineVision, which was
18 intended to allow the parties to the agreement to conduct business in China. XSories alleges that
19 it is entitled to a 30% share of ImagineVision but was cut out of the joint venture by several of
20 the new defendants in violation of the underlying agreement.³

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¹ ECF No. 1 at 1–3 (original complaint).

23 ² ECF No. 13 (operative complaint).

³ *Id.* at ¶¶ 51–61.

1 ImagineVision moves to dismiss four of the new claims alleged in the amended
2 complaint for lack of subject-matter jurisdiction and improper venue, arguing that they are
3 subject to arbitration under a provision of the joint-venture agreement requiring that “[a]ll
4 disputes arising from the performance of [the] Agreement” to be arbitrated in Hong Kong.⁴
5 Although ImagineVision isn’t a signatory to the agreement,⁵ it relies on the principle of equitable
6 estoppel, which, under some circumstances, allows a non-signatory to an agreement to enforce
7 that agreement’s arbitration clause against one of its signatories.⁶ ImagineVision also urges me
8 to dismiss all of the new claims against the added defendants—even though they haven’t been
9 served yet and thus haven’t joined in its motion—because it contends that they too would be
10 subject to arbitration and that this court would lack personal jurisdiction over them.⁷

11 But I don’t reach the merits of ImagineVision’s arbitration arguments because, as the
12 plaintiffs point out, ImagineVision requests the wrong form of relief by only seeking to dismiss
13 the select new claims and not also moving to compel arbitration. Citing to an unpublished
14 district court decision, ImagineVision briefly argues that dismissing an action under FRCP

19 ⁴ ECF No. 14 at 6 (citing ECF No. 14-1 at 20 (joint-venture agreement)).

20 ⁵ *Kramer v. Toyota Motor Corp.*, 705 F.3d 1122, 1126 (9th Cir. 2013) (“Generally, the
21 contractual right to compel arbitration may not be invoked by one who is not a party to the
22 agreement and does not otherwise possess the right to compel arbitration.” (internal quotation
marks and citation omitted)).

23 ⁶ *Id.* at 1128 (“Where a nonsignatory seeks to enforce an arbitration clause, the doctrine of
equitable estoppel applies in two circumstances . . .”).

⁷ ECF No. 14 at 10–13.

1 12(b)(1) for lack of subject-matter jurisdiction is the proper remedy when a contract requires
2 arbitration.⁸ It also contends that courts have similarly relied on FRCP 12(b)(6).⁹

3 But the question of what type of Rule 12(b) motion is proper under these circumstances
4 misses the point. The Federal Arbitration Act (FAA) “reflects” the “liberal federal policy
5 favoring arbitration,”¹⁰ and thus allows a party who believes that a dispute falls within the ambit
6 of an arbitration agreement to move a district court for “an order directing the parties to proceed
7 to arbitration in accordance with the terms of the agreement.”¹¹ If the court finds that the
8 agreement applies, it has no discretion on the matter and must order the parties to arbitrate part or
9 all of their dispute.¹² And by compelling arbitration, a court must remove the case from its own
10 docket and therefore usually dismisses it without prejudice—sometimes relying on Rule 12(b)(1)
11 or 12(b)(6).

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14 ⁸ ECF No. 16 at 6; *Filimex, LLC v. Novoa Invs., LLC*, 2006 WL 2091661, at *2 (D. Ariz. July 17,
15 2006) (“Although section four of the Federal Arbitration Act (‘FAA’) provides for the filing of a
16 motion to ‘compel’ arbitration, courts have held that a Rule 12(b)(1) motion to dismiss for lack
17 of subject matter jurisdiction ‘is a procedurally sufficient mechanism to enforce [an][a]rbitration
18 [p]rovision.’” (alterations in original) (quoting *Cancer Ctr. Assocs. for Research & Excellence,
19 Inc. v. Philadelphia Ins. Cos.*, 2015 WL 1766938, at *2 (E.D. Cal. Apr. 17, 2015))). Curiously,
20 the only other case that ImagineVision cites on this matter questions the propriety of dismissing
an action under Rule 12(b)(1). *Minn. Supply Co. v. Mitsubishi Caterpillar Forklift Am. Inc.*, 822
F. Supp. 2d 896, 905 n.10 (D. Minn. 2011) (“To dismiss a federal action for lack of subject
matter jurisdiction *because* the dispute is subject to a binding arbitration agreement mistakenly
assumes that an arbitrable dispute, by definition, falls outside the realm of federal jurisdiction.
Moreover, the fact that the parties have contractually agreed to resolve any particular dispute by
arbitration says nothing about whether that dispute would satisfy federal question, diversity or
any other basis of subject-matter jurisdiction.”).

21 ⁹ See, e.g., *Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc.*, 368 F.3d 1053, 1056 (9th Cir.
2004) (addressing a motion to compel arbitration brought under FRCP 12(b)(6)).

22 ¹⁰ *Kramer*, 705 F.3d at 1126 (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339
(2011)).

23 ¹¹ 9 U.S.C. § 4.

¹² *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985).

1 Here, ImagineVision seeks to dismiss the new joint-venture-related claims because it
2 contends that they must be arbitrated, but it does not also move for an order mandating
3 arbitration. Rather, it appears that ImagineVision expects that, if these claims are dismissed, the
4 parties will amicably agree to initiate arbitration. But that is not what the FAA calls for. If
5 ImagineVision believes that the joint-venture agreement's arbitration provision covers the new
6 claims that it highlights, then it must move to compel arbitration.¹³ I therefore deny
7 ImagineVision's motion to dismiss without prejudice to its ability to move to compel arbitration.
8 Accordingly,

9 IT IS HEREBY ORDERED that ImagineVision's motion to dismiss [ECF No. 14] is
10 **DENIED without prejudice.**

11 Dated: March 31, 2019

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14 U.S. District Judge Jennifer A. Dorsey
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23 ¹³ As the plaintiffs point out, the lack of an order compelling arbitration would be particularly
problematic in this case given that ImagineVision is not a signatory to the joint-venture
agreement.